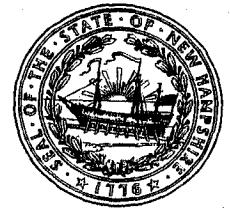




The State of New Hampshire
Department of Environmental Services



Michael P. Nolin
Commissioner

Thomas Fraser
Christine Fraser
P.O. Box 683
West Ossipee, NH 03890

Re: 6 Depot Square Road, Ossipee, NH
Tax Map 26, Lot 28, File #2004-2594

**NOTICE OF PROPOSED
ADMINISTRATIVE FINE
No. AF 05-095**

December 22, 2005

I. INTRODUCTION

This Notice of Proposed Administrative Fine is issued by the Department of Environmental Services, Water Division to Thomas and Christine Fraser, pursuant to RSA 482-A and NH Admin. Rule Env-C 601. The Division is proposing that fines totaling \$7,000 be imposed against Thomas and Christine Fraser for the violations alleged below. **This notice contains important procedural information. Please read the entire notice carefully.**

II. PARTIES

1. The Department of Environmental Services, Water Division ("the Division"), is an administrative agency of the State of New Hampshire, having its principal office at 29 Hazen Drive, Concord, New Hampshire.
2. Thomas and Christine Fraser are individuals having a mailing address of P.O. Box 683, West Ossipee, NH 03890.

III. SUMMARY OF FACTS AND LAW SUPPORTING CLAIMS

1. Pursuant to RSA 482-A, the Department of Environmental Services regulates dredging, filling, and construction in or on any bank, flat, marsh, or swamp in and adjacent to any waters of the state. Pursuant to RSA 482-A:11, I, the Commissioner of DES has adopted Wt 100 *et seq.* to implement this program.
2. Pursuant to RSA 482-A:13 and RSA 482-A:14, III, the Commissioner is authorized to impose fines of up to \$2,000 per violation for violations of the statute, of rules adopted pursuant to the statute, or of any order or permit issued under the statute. Pursuant to RSA 482-A:11, I, the Commissioner has adopted Env-C 614 to establish the schedule of fines for such violations.
3. Thomas and Christine Fraser are the owners of land located on 6 Depot Square Road, more particularly described on Town of Ossipee Tax Map 26 as Lot 28 ("the Property").
4. On October 24, 2004, the Division received a complaint from the Ossipee Conservation Commission alleging that fill had been placed in wetlands on the Property.
5. By letter dated November 3, 2004, the Division notified Mr. and Ms. Fraser of the complaint,

requested that they refrain from further work, and respond to the allegation within 20 days of the date of the letter.

6. Division records indicate that no response was received.
7. On May 19, 2005, Division personnel left a voice mail message at the Fraser residence informing them that the Division would be conducting a field inspection, and to call the Division if they wanted to be present at the field inspection.
8. Division records indicate that no response was received prior to the inspection.
9. On May 25, 2005, Division personnel conducted a field inspection of the Property and observed or learned the following:
 - a. Approximately 5,000 square feet of fill had been placed in a jurisdictional wetland. The wetland was a vernal pool; and
 - b. Division personnel spoke with a person who identified himself as Ryan Fraser, son of the property owner, Thomas Fraser. Division personnel learned that Mr. and Ms. Fraser were away on vacation, and would return on May 31, 2005. A Division staff member left her business card with Ryan Fraser and requested that Mr. and Ms. Fraser call the Division upon their return; and
 - c. A review of Division records show that no permit was issued under RSA 482-A:3 to Mr. and Ms. Fraser, or to anyone else, for the fill observed on the Property.
10. On June 9, 2005, Thomas Fraser contacted the Division by telephone. Mr. Fraser stated that he "did not think the area was a wetland because it dried up in the summer, and that he would continue to fill it."
11. On June 27, 2005, DES issued Administrative Order No. WD 2005-019 (the "Order") to Thomas and Christine Fraser pursuant to RSA 482-A:6. The Order required Mr. and Ms. Fraser to:
 - a. Immediately cease from further filling in any wetlands;
 - b. Retain a certified wetland scientist to prepare a restoration plan prior to July 15, 2005;
 - c. Submit a restoration plan to the Division by August 15, 2005; and
 - d. Implement the restoration plan by October 15, 2005.
12. The Division received complaints that fill continued to be placed in the wetland, after the Order was issued. On July 9, 2005, the Ossipee Police Department served Mr. and Ms. Fraser with a copy of the Order.
13. On July 12, 2005, Division personnel spoke with Mr. Fraser and learned the following:

- a. The Ossipee Police Department had served him with a copy of the Order; and
- b. Mr. Fraser asserts that when he purchased the property seven years ago, he was told by a state engineer that there were no wetlands on the property; and
- c. Mr. Fraser desired to fill half the area and then create a pond in the other half; and
- d. Mr. Fraser gave permission to a local contractor to dump sand in the vernal pool. When the contractor began to dump stumps and roots into the vernal pool, Mr. Fraser asserts that he requested that the contractor cease filling; however, the contractor's employees continued to fill the area; and
- e. Mr. Fraser stated that if the site was a wetland, the state was obligated to purchase the property from him under Article IV of the New Hampshire Constitution; and
- f. Mr. Fraser stated that he was living from "week to week" and could not afford to restore the Property; and

At the conclusion of the conversation, Division personnel suggested that he contact the Carroll County Natural Resource Conservation Service ("NRCS") office for possible assistance.

- 14. On July 13, 2005, the original Order, sent by certified mail, was returned to the Division marked "unclaimed."
- 15. On July 15, 2005, Division personnel spoke with Mr. Fraser who asserted that NRCS was unable to assist Mr. Fraser. Division personnel suggested that Mr. Fraser look in the telephone book for a consultant and inform the Division of the name of the consultant once he retained one.
- 16. Division records indicate that Mr. Fraser has not informed the Division, to date, that he has retained a certified wetlands scientist. The Order was not appealed.
- 17. On August 25, 2005, DES attempted to contact Mr. Fraser by calling his cell phone. The reception was poor, so Mr. Fraser stated that he would call the Division back later that day. No return call was received.
- 18. On September 14, 2005, the Division received an e-mail from Mr. Fraser stating that "... I don't have any money to deal with this the way your [sic] talking. ... If the state is telling me my property is wetland? Maybe they need to buy it. I only own .96 acres, I'm not going to worry about the state telling me what i [sic] can or cannot do on such a small piece of land. Please let me know what you would like for me to do next."
- 19. On September 29, 2005, the Division conducted a "drive-by" inspection to determine if the fill had been removed and found that it had not.
- 20. On September 29, 2005, the DES Legal Unit sent a letter to Mr. and Ms. Fraser informing them that the Order remained valid. The letter requested that they submit the name of their consultant to DES within 10 days of the date of the letter.

21. Division records indicate that a response was not received.

IV. VIOLATIONS ALLEGED AND PROPOSED ADMINISTRATIVE FINES

1. Mr. and Ms. Fraser have violated RSA 482-A:3 by filling 5,000 square feet of fill in wetlands without a permit from DES. For this Class II violation, Env-C 614.03 (b) authorizes a fine of \$1,000.

2. Mr. and Ms. Fraser have violated Administrative Order No. WD 2005-019 issued by DES pursuant to RSA 482-A:6 on June 27, 2005 by:

- a. Failing to retain a certified wetland scientist by July 15, 2005; and
- b. Failing to submit a restoration plan by August 15, 2005; and
- c. Failing to restore the property by October 15, 2005.

For these violations, Env-C 614.06(e) specifies a fine of \$2,000 per violation of an order, or \$6,000 for the violations of Administrative Order No. WD 2005-019 issued by DES pursuant to RSA 482-A:6 on June 27, 2005.

The total fine being sought is \$7,000.

V. REQUIRED RESPONSE, OPPORTUNITY FOR HEARING

Pursuant to Env-C 601.06, Thomas and Christine Fraser are required to respond to this notice. Please respond no later than January 24, 2006 using the enclosed colored form.

1. If you would like to have a hearing, please sign the appearance section of the colored form (upper portion), check the appropriate line requesting a **formal hearing** and return it to the DES Legal Unit, at the address noted on the form.
2. If you wish to discuss the possibility of settling the case, please sign the appearance, check the appropriate line indicating a desire to **meet informally** and return it to the DES Legal Unit.
3. If you choose to waive the hearing and pay the proposed fine, please sign the waiver (lower portion) and return it **with payment of the fine** to the DES Legal Unit.

You are not required to be represented by an attorney. If you choose to be represented by an attorney, the attorney must file an appearance and comply with NH Admin. Rule Env-C 200.

VI. DETERMINATION OF LIABILITY FOR ADMINISTRATIVE FINES

Pursuant to Env-C 601.09, in order for any fine to be imposed after a hearing, the Division must prove, by a preponderance of the evidence, that you committed the violations alleged and that the total amount of fines sought is the appropriate amount under the applicable statute and rules. Proving something by a preponderance of the evidence means that it is **more likely than not** that

the thing sought to be proved is true.

If the Division proves that you committed the violations and that the total amount of fines sought is the appropriate amount under the applicable statute and rules, then the fine sought will be imposed, subject to the following:

* Pursuant to Env-C 601.09(c), the fine will be **reduced by 10%** for each of the circumstances listed below **that you prove, by a preponderance of the evidence**, applies in this case:

1. The violation was a one-time or non-continuing violation, **and** that you did not know about the requirement when the violation occurred, **and** the violation has not continued or reoccurred as of the time of the hearing, **and** any environmental harm or threat of harm has been corrected, **and** that you did not benefit financially, whether directly or indirectly, from the violation.
2. At the time the violation was committed, you were making a good faith effort to comply with the requirement that was violated.
3. You have no history of non-compliance with the statutes or rules implemented by DES or with any permit issued by DES or contract entered into with DES.
4. Other information exists which is favorable to your case which was not known to the Division at the time the fine was proposed.

*******IMPORTANT NOTICE*******

An administrative fine hearing is a formal hearing. All hearings will be recorded, and all witnesses will testify under oath or affirmation. At the hearing, the Division will present testimony and evidence to try to prove that you committed the violation(s) alleged above and that the fine(s) should be imposed. **The hearing is your opportunity to present testimony and evidence that you did not commit the violation(s) and/or that the fine(s) should not be imposed, or that the fine(s) sought should be reduced.** If you have any evidence, such as photographs, business records or other documents, that you believe show you did not commit the violation(s) or that otherwise support your position, you should bring the evidence to the hearing. You may also bring witnesses (other people) to the hearing to testify on your behalf.

Information regarding this proposed fine may be made available to the public via the DES Web page (www.des.nh.gov). If you have any questions about this matter, please contact the DES Legal Unit, at (603) 271-6072.


COPY
Harry T. Stewart, P.E.
Director, Water Division

Enclosure (NHDES Fact Sheet #CO-2002)

cc: Michael J. Walls, DES Assistant Commissioner
Jennifer J. Patterson, Sr. Asst. Attorney General, NHDOJ/EPB
Public Information Officer, DES PIP Office
Kerry D. Barnsley, Compliance Attorney, DES Legal Unit
Linda Magoon, DES Wetlands Bureau
cc: NH Association of Conservation Commissions
Town of Ossipee Conservation Commission
Town of Ossipee Board of Selectmen

***** RETURN THIS PAGE ONLY *****

**THOMAS AND CHRISTINE FRASER ARE REQUIRED BY LAW
TO RESPOND TO THIS NOTICE.**

PLEASE RESPOND NO LATER THAN January 24, 2006

Please check the appropriate line and fill in the requested information below:

APPEARANCE On behalf of Thomas and Christine Fraser:

_____ We request to have a **formal hearing** scheduled in this matter.

_____ We would like to **meet informally** to discuss the issues in this matter.

WAIVER OF HEARING On behalf of Thomas and Christine Fraser:

_____ We certify that we understand the right to a hearing regarding the imposition of the proposed administrative fine and that we hereby waive those rights. The fine payment in the amount of \$7,000 paid to "Treasurer, State of New Hampshire" is enclosed.*

**If payment is made by a check, draft, or money order that is returned due to insufficient funds, pursuant to NH RSA 6:11-a, DES may charge a fee in the amount of 5% of the face amount of the original check draft, or money order or \$25.00, whichever is greater, plus all protest and bank fees, in addition to collecting the amount of the original check draft, or money order.*

Pursuant to Env-C 203.05 please provide the following information:

Signature

Date

Name (please print or type): _____

Signature

Date

Name (please print or type): _____

Title: _____

Phone: _____

RETURN THIS PAGE ONLY AND ANY PAYMENT TO:

DES Legal Unit

Attn: Michael Sclafani, Legal Assistant

P.O. Box 95, Concord, NH 03302-0095

ENVIRONMENTAL Fact Sheet



29 Hazen Drive, Concord, New Hampshire 03301 • (603) 271-3503 • www.des.nh.gov

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Administrative Fines of the Department of Environmental Services

The Commissioner of the Department of Environmental Services (DES) is authorized by several statutes to impose administrative fines for certain violations of those statutes. In order to implement this authority, the Commissioner has adopted rules which specify the procedures for notifying people that a fine is being proposed and which specify the fine amount for any given violation. These rules are identified as Chapter Env-C 600.

Administrative fine proceedings follow a defined path. The first step is for a Division of DES to issue a Notice of Proposed Fine. The Notice will inform you of the violations the Division believes you have committed, together with the dollar amount of the fine that is being proposed. At this point, a final decision as to whether to impose the fine **has not been made** ... the Notice simply initiates the proceeding. The Notice will also inform you that you have a right to have a hearing before a final decision will be made, and may give a date and time for the hearing.

The Notice you receive will have a page attached to it on which you can indicate whether you will attend a hearing or whether you are waiving your right to a hearing and paying the fine which has been proposed. **YOU MUST COMPLETE AND RETURN THIS FORM.** The worst thing you can do if you receive a Notice is to ignore it! Under the rules which have been adopted, the case can proceed even if you don't respond. In order to achieve the best result, you must participate in the process.

When you receive a Notice of Proposed Fine, if you are interested in trying to settle the case without going to a formal hearing you should contact the person identified in the Notice. Many fine cases are settled in this way, often with a lower fine, a payment schedule, and/or a suspended fine. The negotiations need to start soon after the Notice is received, though. Don't wait until the day scheduled for the hearing to ask about settling the case.

If the case proceeds to a hearing, the Commissioner will designate a person to serve as a hearing officer to preside at the formal hearing. The hearing officer will not have prior knowledge of the Division's allegations, and will be neutral insofar as the outcome of the case is concerned. At the hearing, the Division will be required to prove that the violation(s) occurred and that the proposed fine is warranted. You will have an opportunity to ask questions of (cross-examine) the Division staff, and also present your own evidence, including testimony of witnesses if you wish, to show why the fine should not be imposed.

(over)

After the hearing is over, the hearing officer will compile the record (i.e. all of the information that was received at the hearing) and will make a recommendation to the Commissioner as to whether or not the fine should be imposed. The Commissioner will make a decision based on the evidence and testimony, and the decision issued by the Commissioner will specifically state the reasons for the decision.

The rules adopted by the Commissioner require the proposed fine to be reduced in certain circumstances, which are listed at Env-C 601.09. These include that you have not previously violated a law or rule implemented by DES, or that you acted in good faith. The Commissioner also has the discretion to allow you to pay a fine on a payment schedule, and/or to suspend all or a portion of the fine conditional upon remedying the underlying violation or staying in compliance with DES requirements for a specified period of time.

Sometimes people are concerned that the findings and rulings made by the Commissioner might be used against them in a separate proceeding (for instance, if their neighbor sues them for damages arising out of the same violation(s) for which they are being fined). In such a case, DES has accepted payment of the fine with a specific denial of liability. This is like pleading "no contest" to a traffic ticket: you pay the fine assessed, but are not admitting that you did anything wrong.

This fact sheet is intended as a basic source of information concerning DES administrative fines. It is not intended to replace the laws and rules regarding administrative fines, but merely to provide a summary of them.

For more information contact the DES Legal Unit, PO Box 95, Concord, NH 03302-0095, (603) 271-6072.